

When – either during or post-recruitment – can an experienced manager be fixed with constructive knowledge of an undeclared disability, for instance signs of dyslexia or a mental health condition? What is HR expected to know and do?

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## Introduction

In some circumstances, employers will know whether a job applicant or member of staff is disabled, either because it is apparent (e.g. because they use a wheelchair) or because they have disclosed their disability.

However, that will not always be the case. Some disabilities, such as mental health conditions, are not immediately apparent, and not all job applicants or employees suffering with such conditions will have disclosed it to you.

In those circumstances, it is possible for an employer to be fixed with constructive knowledge of their disability. This means that, whilst it did not actually know the person was disabled, it could reasonably be expected to know it (or, put another way, it ought to have known).

The issue of constructive knowledge arises most often in reasonable adjustments cases, but its relevance is wider than that. In order for a job applicant or an employee to succeed in a direct disability discrimination or a discrimination arising from disability case (N.B. not an indirect discrimination claim), the Employment Tribunal will have to find as a matter of fact that the employer had actual or constructive knowledge of their condition, which needs to be a disability within the Equality Act 2010 (“EqA 2010”).

## Defining ‘disability’

1. According to section 6 of the EqA 2010, a person has a disability if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.
2. Breaking that down, the job applicant or employee will be disabled if:
  - a) **they have a physical or mental impairment;**
  - b) **the impairment has an adverse effect on their ability to carry out normal day-to-day activities.** ‘Normal day-to-day activities’ means things which all people normally do on a regular or daily basis. The European Court of Justice in *Chacón Navas v Eurest Colectividades SA*<sup>1</sup> held that this includes working activities, in that the disability “hinders the participation of the person concerned in professional life”. That may

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<sup>1</sup> [2006] IRLR 706

include a reduced ability to do work-related assessments<sup>2</sup>, lift or move objects<sup>3</sup>, remain standing up for long periods of time<sup>4</sup>, or work night shifts<sup>5</sup>;

- c) **that adverse effect is substantial**, i.e. more than minimal or trivial; and
- d) **that adverse effect is long-term**. An impairment has a long-term effect if it: (i) has lasted for at least 12 months; (ii) is likely to last for at least 12 months; or is likely to last for the rest of the affected person's life<sup>6</sup>.

## What conditions could amount to a disability?

### *Is dyslexia a disability?*

- 3. Dyslexia has recently made national headlines following an Employment Tribunal's judgment in *Kumulchew v Starbucks Coffee Company UK Limited and others*<sup>7</sup> in which it was held that Starbucks had discriminated against an employee, Meseret Kumulchew, on the basis of her dyslexia by failing to make reasonable adjustments and subjecting her to unfavourable treatment because of something arising in consequence of her disability.
- 4. However, thinking back to the definition of disability, it is clear that whilst some cases of dyslexia will be a disability, others will not be. Ms Kumulchew's dyslexia was severe and had a significant adverse impact on her ability to do certain tasks, particularly reading, spelling and processing information.
- 5. In milder cases, where the effects of dyslexia are less pronounced, there may not be a significant adverse impact on the sufferer's ability to carry out normal day-to-day activities. In those cases, a Tribunal may find that the sufferer did not have a disability and therefore had no standing to bring a discrimination claim, regardless of whether their employer was aware of their dyslexia.

### *Mental impairment and disability*

- 6. As with dyslexia, mental impairments can range in severity, and those with less severe effects may not attract protection as a disability.
- 7. The classic example of this is stress. Stress, in and of itself, is not regarded as a disability by employers or Tribunals. It is generally regarded as a potential cause or effect of other health impairments rather than a condition in its own right; i.e. prolonged stress can, for instance, cause heart problems or develop into anxiety disorder.
- 8. As such, even if you are aware that a particular employee is stressed, you do not at that stage owe any duties to make reasonable adjustments. However, from a practical

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<sup>2</sup> *Paterson v Commissioner of Police of the Metropolis* [2007] IRLR 763

<sup>3</sup> *Banaszczyk v Booker Ltd* UKEAT/0132/15

<sup>4</sup> *Aderemi v London and South Eastern Railway Ltd* UKEAT/0316/12

<sup>5</sup> *Chief Constable of Dumfries & Galloway Constabulary v Adams* UKEATS/0046/08

<sup>6</sup> Paragraph 2(1), Schedule 1, EqA 2010

<sup>7</sup> 2301217/2014

perspective, you may want to speak to the employee sooner rather than later to see if there is anything you can do to ease their stress; not only could this help avoid the employee's stress developing into a disability, but it could insure against future sickness absence.

## **Finding constructive knowledge**

9. In *Wilcox v Birmingham CAB Services Ltd*<sup>8</sup>, the Employment Appeal Tribunal made clear that an employer cannot be under a duty to make reasonable adjustments unless it knows (actually or constructively) both that the employee is disabled, and that the disability puts the employee at a substantial disadvantage.
10. Therefore, once a Tribunal has concluded that you did not have actual knowledge of the claimant's disability, it will then consider whether you had constructive knowledge of it. The burden lies on the employer to show that it was unreasonable for it to have had that knowledge.
11. This line of enquiry will feature in cases of direct disability discrimination, discrimination arising from disability and failures to make reasonable adjustments. It will not, however, be part of the Tribunal's analysis in an indirect discrimination claim; in such cases, the key is whether a provision, criterion or practice puts people with a particular protected characteristic (here, disability) at a particular disadvantage, so the employer's knowledge or otherwise of the claimant's disability is irrelevant.
12. When the Tribunal considers whether the employer had constructive knowledge of a person's disability, it will examine whether, on the facts before the employer, it should reasonably have known about the disability.
13. That does not mean that employers who simply close their eyes to the facts absolve themselves of any liability. The Equality and Human Rights Commission's Employment Code of Practice ("EHRC Code") states that employers must "*do all they can reasonably be expected to do to find out*" whether an employee is disabled, with what is reasonable depending on the size and resources of the employer. That said, a person's health status can be a delicate topic, so the EHRC Code makes clear that "*employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially*"<sup>9</sup>.
14. The degree of enquiry appropriate in any given case will depend on the circumstances. Different levels of enquiry will be appropriate depending on whether the person is a job applicant or an employee; the distinction is considered in more detail below.
15. What is more, it was established in *Gallop v Newport City Council*<sup>10</sup> that what the employer needs to know in order to be liable is not that the employee meets the legal definition of disability; rather, it will be fixed with constructive knowledge once it knows of the *facts* which give rise to the claimant's disability. In *Gallop*, that meant that as the employer had

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<sup>8</sup> *UKEAT/0242/09*

<sup>9</sup> Paragraph 6.19

<sup>10</sup> [2013] EWCA Civ 1583

been told by Occupational Health (“OH”) that the Claimant was suffering with symptoms of moderately severe depression, it was no defence that they believed it was not a disability within the meaning of the EqA 2010.

### **Constructive knowledge of disability during recruitment**

16. If an employer learns that a job applicant is disabled during the recruitment process, it is prohibited from treating them less favourably than it would a non-disabled applicant because of it, and from subjecting them to unfavourable treatment because of something which arises in consequence of their disability. Equally, the employer would have a duty to make reasonable adjustments to help the applicant to overcome a disadvantage caused by their disability.
17. Some applicants may be transparent about any disability at the outset. Others, on the other hand, may be less forthcoming, for any of a number of reasons. For example, they may feel that they do not want to share personal information at that early stage due to privacy or a concern that they may be stigmatised.
18. At the recruitment stage, an employer will probably have had limited dealings with each applicant; it will have seen a CV or application form as a minimum and probably exchanged emails with them. It may have seen a picture of them, spoken on the telephone or even met in person, but it is by no means a given.
19. In most cases, then, it is likely that the first chance an employer will have to see that an employee has an apparent disability is at an interview. However, for an applicant in a wheelchair, for example, that would be too late, as coming to an interview could put them at a disadvantage if the location is not accessible.
20. The question of what enquiries an employer can make at that stage is a difficult one, as it will not yet have an established relationship with that person.

#### *Pre-employment health questions*

21. Many employers’ first thoughts would be simply to ask the applicant if they are disabled, whether in conversation or on the job application form itself.
22. However, it is not quite that simple. Section 60 of EqA 2010 prohibits employers from asking questions about a job applicant’s health before offering them a job, unless they have a prescribed reason for doing so. Among the prescribed reasons for asking about an applicant’s health are to establish whether:
  - (i) the applicant will be able to undergo an assessment (i.e. an interview or an aptitude test);
  - (ii) the employer will be under a duty to make reasonable adjustments in relation to any assessment (i.e. making an interview accessible or providing a test in a different format); and
  - (iii) the applicant will be able to carry out a function which is intrinsic to the job they are applying for.

23. Note that this only covers establishing whether reasonable adjustments are necessary in relation to the recruitment process. As the EHRC Code<sup>11</sup> states, this means that employers should not be asking any questions relating to whether reasonable adjustments are needed for the job itself until after it has been offered to them, unless the questions concern whether they can perform a function which is intrinsic to the role.
24. If an employer asks a question about an applicant's health which does not have a prescribed reason behind it, it will automatically shift the burden of proof to the employer if the applicant goes on to bring a direct disability discrimination claim, which could make it somewhat easier for them to make out their case.
25. The way that an employer phrases questions about health is important. The EHRC Code suggests that a lawful way of inquiring about an applicant's disability would be to include a question in an application form to the effect of "*please contact us if you are disabled and need any adjustments for the interview*"<sup>12</sup>.
26. Equally, the EHRC Code gives the example of an employer who is looking to recruit play workers for an outdoor activity centre. It holds a practical test using the equipment as part of its recruitment process. It asks in its application form a question about recruits' health so that they know not to require people with mobility impairments to perform the practical test. The EHRC Code confirms that the employer would be acting lawfully in asking that question<sup>13</sup>.
27. Once an employer has asked the question in its application form, it is entirely the applicant's decision as to whether or not they answer it; otherwise, if the employer asks a direct question about whether someone is disabled, it should include a 'prefer not to say' option.
28. Whilst it is not determinative, the employer's having asked whether any reasonable adjustments are needed in the recruitment process could help a Tribunal to find that it had taken reasonable steps to gain knowledge of disability and thereby avoid being fixed with constructive knowledge of disability.

#### *Asking for a pre-employment medical report*

29. An employer may feel that it is appropriate to ask a prospective employee to attend a medical examination before commencing employment, either because their health or physical ability is key to the job, or as a prerequisite to signing them up to a benefit such as a health insurance scheme.
30. The usual course would be to make a job offer to a candidate conditional on receipt of a medical report; broaching the subject of the applicant's health at that stage would avoid infringement of section 60 EqA 2010, as they have been offered the role.

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<sup>11</sup> Paragraph 10.30

<sup>12</sup> *Ibid.*

<sup>13</sup> Paragraph 10.31

31. Note that if an employer asks a prospective employee's GP or specialist (or any other medical professional who is or has been responsible for that person's clinical care) to provide a medical report, it will be subject to the Access to Medical Reports Act 1988 ("AMRA").
32. AMRA protects any person who has been, is or is seeking to be employed "*whether under a contract of service or otherwise*"<sup>14</sup>. If an employer wants to request a medical report which would be covered by AMRA, it may only do so once:
  - (i) it has notified the prospective employee that it intends to make that application; and
  - (ii) the prospective employee has given written consent to the application being made.
33. The employer must also provide the prospective employee with advice on their rights under AMRA at that time. Their rights include being able to see the report before it is submitted to the employer, refusing to allow the report to be submitted to the employer, and requesting changes to the report (though they cannot insist on them if the medical professional disagrees).
34. In its letter to the prospective employee, the employer should set out the extent of medical information it is seeking and the reasons why it needs it. In order to avoid breaching a prospective employee's right to privacy, the employer should ensure that its request is limited only to things which are directly relevant to the purpose of the report; i.e. if it is seeking it to check whether the person will be able to do certain physical tasks required of them, it should set out those tasks, ask if the person is medically capable of performing them, and go no further. Sending the job description or person specification with the instruction and focusing questions on it will help in this regard. General questions about an employee's overall health are best avoided if possible.
35. If the prospective employee withholds their consent to the application being made, and as long as the employer's request was reasonable and proportionate, the employer may be entitled to withdraw its offer of employment.
36. On the other hand, if the employer gets the prospective employee's consent, it may write to the relevant medical expert to instruct them to carry out an examination. The employer should make sure that it has given due thought to the contents of the letter, as it will be disclosable should any Employment Tribunal proceedings follow. Therefore, it should be careful to avoid pushing the expert to a particular conclusion or including any assumptions in its instructions.

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<sup>14</sup> Section 1, AMRA

37. Note that information about a person's health is considered to be 'sensitive personal data' under the Data Protection Act 1998, which means employers have an obligation to ensure that data obtained via a medical report is relevant, accurate, up-to-date and kept securely. Employers should also avoid retaining it for longer than is necessary and ensure that managers can only access information about the prospective employee's current and future fitness to work.

### *Constructive knowledge?*

38. Ultimately, if the employer has asked sensitively worded and appropriate health questions in its job application form and heard nothing material back, it will in most instances be regarded as having done enough at the recruitment stage to avoid having constructive knowledge of an applicant's disability. It simply will not always be appropriate to request a medical report at the job offer stage of the relationship.
39. However, if the job applicant does express some particular medical need which could amount to a disability, the employer may (depending on the circumstances) at that stage be fixed with constructive (if not actual) knowledge of their disability and be subject to the duty to make reasonable adjustments.

### **Constructive knowledge during employment**

40. The question of constructive knowledge during employment is necessarily a fact-sensitive one and there is no hard-and-fast rule that an employer could look to apply across the board. Instead, managers and HR need to keep their eyes open for any indications from their employees that they may be unwell or struggling.
41. Some cases suggest that there will be enough evidence with which to fix the employer with constructive knowledge even at a stage before they have sought a medical opinion, an example being *Department of Work and Pensions v Hall*<sup>15</sup>. Miss Hall was suffering from a psychological condition for which she was prescribed medication. Prior to confirming her appointment, her employer sent her a letter to say:

*"We will be making enquiries into your health, qualifications and references... In relation to the enquiries concerning your health, if the outcome is unsatisfactory or if in particular no reasonable adjustments can be made, your employment may be terminated."*

42. Miss Hall then completed a health questionnaire before starting her job and indicated that she was not suffering with a disability. When the employer asked her for access to her medical records, Miss Hall refused. The Tribunal (upheld by the Employment Appeal Tribunal) found that the refusal regarding medical records should have acted as a 'warning sign' that there were underlying health issues Miss Hall was concerned the employer would uncover. Given that there are a number of reasons why an employee may not consent to their employer seeing their medical records, it is surprising that the Tribunal was able to read so much into Miss Hall's refusal.

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<sup>15</sup> UKEAT/0012/05/DA

43. In addition, one of the panel members who interviewed her had known her for a long time (and was presumably therefore aware of her health issues) and Miss Hall's manager and HR had received an application form for disabled person's tax credit. Therefore, the Tribunal concluded that the employer ought to have known that Miss Hall's conduct at work had been volatile and disruptive as a consequence of her disability.
44. This decision is rather pro-Claimant, fixing the employer with constructive knowledge on the basis of less evidence than employers in subsequent cases have had. This may be because it is an early decision, dating back to 2005; the way that Tribunals approach the question seems to have moved on since then (see discussion of subsequent cases below), and the direction of travel is in favour of giving the employer the benefit of the doubt.
45. However, despite the more employer-friendly view Tribunals seem to be taking at present, the principle remains that an employer is unlikely to be fixed with constructive knowledge if it has done all it reasonably can be expected to do to try to uncover more information. This means that some degree of investigation will always be necessary.
46. The first port of call will generally be a referral to Occupational Health, which should be done sooner rather than later. OH will need to be asked for a focused view on what the employee's condition actually is and what effects it could have on the employee's ability to perform their duties (as discussed above, appending the employee's job description to the instruction letter would assist with this). There is no reason why an employer cannot ask OH if the employee meets the legal definition of disability but, in addition to that, the instructions should break it down into the constituents of the test (i.e. whether there is a physical impairment, whether it has a substantial adverse impact on the employee's ability to do day-to-day activities, and whether it will or has lasted for 12 months).
47. That was the course the employer was trying to take in *Donelien v Liberata*<sup>16</sup>. Ms Donelien had, in the space of a year, taken 128 days off sick due to illness such that, in the Employment Tribunal's words, she was rarely at work.
48. At the point at which Ms Donelien's employer referred her to Occupational Health for an assessment in May 2009, she had taken 87 days' sick leave, which comprised: 2 days for unknown reasons; 3 days for stress; 11 days with a possible viral infection; 18 days with viral illness/raised blood pressure; two and a half days with dizziness; and 23 days with dizziness/hypertension. In the months after the referral, she had 5 days off due to difficulty breathing, one day after an adverse reaction to medication, 5 days with a head cold, then 16 and a half days with wrist pain and an upset stomach.
49. Faced with the large number of absences and range of disparate reasons, the employer asked Occupational Health whether Ms Donelien may be suffering with any medical condition which could explain them. Specifically, it asked OH 6 questions:

- " 1. *Provide us with an update on Edith's general health?*  
2. *Confirm whether Edith has any medical condition that explains this pattern of absence?*

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<sup>16</sup> UKEAT/0297/14/JOJ

3. *Confirm whether Edith's condition affects her ability to carry out her duties or necessitates time off work and if so to what extent?*
  4. *Confirm how long this condition is likely to last and whether she is likely to be able to render regular service in the future.*
  5. *Confirm whether Edith has a condition which would be recognised as a Disability under the Disability Discrimination Act.*
  6. *If so whether there are any reasonable adjustments that you recommend."*
50. OH's response did not sufficiently address those questions, so the employer followed up to ask for more detail. OH again failed specifically to answer the queries, but said it was 'extremely unlikely' that hypertension could cause a long-term illness certification and that it was highly unusual for it to necessitate working only 3 days per week.
51. The employer did not press OH any further but instead conducted return to work interviews, discussed matters with Ms Donelien directly and read correspondence from her GP at her request. Having done so, it dismissed Ms Donelien for unsatisfactory attendance, failure to work contractual hours and non-adherence to the absence notification procedure.
52. The Tribunal and the EAT were both satisfied that the employer had done enough to prevent itself from gaining constructive knowledge of Ms Donelien's disability. Whilst it was true to say that it could have done more to pin down OH's view on the particular questions posed, it was not necessary for them to have done so. An employer need only do that which it is reasonable for it to do – it does not need to exhaust every possible avenue. The employer had made efforts of its own to gain information from Ms Donelien, but she had been obstructive in that process, making it harder for the employer to see the difference between what she could not do for health reasons and what she did not want to do.
53. Whilst the inadequacy of OH's report in this case was noted, it had not been the sole source of the employer's information; the report had essentially confirmed the opinion the employer had already reached following its own investigation.
54. Had the employer not taken those steps and placed over-reliance on the defective OH report, the decision would have been more like that in *Gallop v Newport City Council* (above). Mr Gallop had, in 2004, emailed his employer to say he had been suffering with stress and had symptoms such as nausea, insomnia, headaches, tearfulness, comfort eating and an inability to concentrate. His employer referred him to OH for stress counselling. In August 2006, Mr Gallop wrote to his employer to say that he had been diagnosed with 'reactive depression' by his GP, as a result of which he was signed off work.
55. The employer referred Mr Gallop to OH once more. The request for the report asked for answers to the following questions:
1. *Is there any improvement in his condition since you last saw him?*
  2. *Is he able to carry out day to day activities?*

3. *Is he fit to attend an investigatory hearing and possibly a disciplinary hearing?*
  4. *Would you consider him to be disabled under the DDA? If so, are there any reasonable adjustments which should be made to his current range of duties?"*
56. A letter from OH (which did not appear to be in response to the above instruction) noted that Mr Gallop's condition was being treated with anti-depressants. A later letter stated that, in the view of the clinician, "*the provisions of [the DDA] do not apply*", though OH did not express its reasons for that view.
57. Mr Gallop's condition deteriorated after a brief return to work in 2007. OH at that time reported that he had depression of moderate severity. This was supported with a letter from Mr Gallop's GP, which stated that he had anxiety and depression and that there were doubts as to whether "*he would successfully return to work in his current job*". Despite that, two further letters from OH expressed the unreasoned view that Mr Gallop was "*not covered under [the DDA]*". When Mr Gallop eventually returned to work in early 2008 he was accused of bullying colleagues and his employer dismissed him on the basis of those allegations.
58. The Court of Appeal held that the employer did have constructive knowledge of Mr Gallop's disability; i.e. it ought to have known that he was suffering from depression. The Court held that the various opinions from OH did not engage at all with the elements of the disability definition, so were "*with respect, worthless*". The Court of Appeal held that the employer could not deny knowledge in circumstances where it had relied blindly on OH's unreasoned opinion; instead, "*it had to form its own judgment on whether Mr Gallop was or was not a disabled person, and OH's views on that topic were of no assistance to them*"<sup>17</sup>.
59. The general rule is therefore: if OH's opinion states that the employee is disabled, the employer should accept it unless there is strong evidence to the contrary; but, if OH states that the employee is not disabled, the employer should think critically about whether it has sufficient information with which to reach that conclusion itself. If not, the employer must press OH for more information or, as the employer did in *Donelien*, attempt to gather information by other means.
60. The key, as discussed above, is that the employer does not need to know whether the employee is disabled within the statutory definition; instead, the employer needs to know the facts of the employee's condition. As the Tribunals in *Wilcox* (above) and *Cox v Essex County Fire and Rescue Service*<sup>18</sup> confirmed, this includes knowledge of whether the employee has been medically diagnosed with a particular condition.
61. In *Wilcox*, the employer introduced a widespread pay cut under new terms. Ms Wilcox complained that this meant she could no longer afford to pay for car parking in relation to her commute. When her employer asked why she could not simply use public transport instead, Ms Wilcox responded that she felt anxious when travelling so would have to use her own car. At that stage the employer's CEO, Ms Davies, asked whether

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<sup>17</sup> [2013] EWCA Civ 1583, paragraph 40

<sup>18</sup> UKEAT/0162/13/SM

there was an underlying medical reason for Ms Wilcox's travel anxiety, to which Ms Wilcox responded that it had never been investigated. Ms Davies then said:

*"Not that I know much about it but, even with agoraphobia, aversion therapy can work in 8 to 10 weeks. Get some medical advice! I don't want to lose you, I think you're a very good caseworker."*

62. Ms Wilcox was told that she could not transfer to a bureau nearer to home where there were no parking fees. She went on sick leave the following day, with her doctor's certificate pointing to "*work-related stress*". She never returned to work.
63. The employer tried to obtain a medical report at that stage but Ms Wilcox, who later admitted to the Tribunal that she "*did not want the respondent to make a decision based on my travel anxiety*" tried to delay the process. Ms Wilcox eventually agreed to be assessed by Dr Brooks, a cognitive behavioural therapist, who reported that Ms Wilcox was "*suffering from a great deal of anxiety in relation to travel generally and also to heights, both of which can trigger high levels of anxiety and indeed sometimes a panic response*". Dr Brooks' suggestion was that Ms Wilcox "*be allowed to work at a venue that involves a relatively short and straightforward journey by car*".
64. Keen to obtain its own evidence, the employer sought two OH reports. The first, from a firm called City Doc, was produced solely on the basis of Ms Wilcox's medical notes because their office was on an upper floor and, as Dr Brooks noted, Ms Wilcox had a fear of heights. It concluded that "*there is no substantial evidence of a psychiatric diagnosis*". The other, at Sandwell Borough Council, met with Ms Wilcox; it found that "*if [Ms Wilcox] has travel phobia as she claims*" then she would need a full psychiatric assessment, but her travel issues were "*more a capability issue than medical*". Ms Wilcox was displeased by the way she was described by the employer in its letters of instruction to OH and considered it to be a breach of mutual trust and confidence; she resigned in response to that alleged breach and the employer's alleged disability discrimination.
65. As part of the Tribunal's directions, a medical expert was jointly instructed to provide a report. The expert, a consultant psychiatrist called Dr Briscoe, concluded that at all material times (i.e. for a number of years) Ms Wilcox had been suffering with agoraphobia which had a serious impact on her mobility, and that it would continue.
66. The Tribunal found that the employer did not have constructive knowledge of Ms Wilcox's disability, finding that the earliest it could have been fixed with knowledge was when it received Dr Briscoe's report (i.e. after she had resigned and brought a claim). She appealed to the EAT.
67. The EAT noted that Ms Wilcox had herself been keen to avoid the employer finding that she had a disability. Whilst it was arguable that the report of Dr Brooks, the cognitive behavioural therapist, alerted the employer to the facts it needed for constructive knowledge, the better view was that the employer was fixed with knowledge once it had received authoritative medical advice on diagnosis. A cognitive behavioural therapist,

whilst accredited by a professional body, is not a medical expert *per se* and the particular condition Ms Wilcox was suffering from was an unusual one.

68. The situation was somewhat similar in *Cox*. Mr Cox had said in his pre-employment medical questionnaire that he suffered from mild depression, for which he took anti-depressants, due to a recent redundancy but did not have a disability. A few years into Mr Cox's employment, his employer had some concerns about his performance. During a meeting between Mr Cox and HR, the former became upset and emotional and shouted. Shortly after that, Mr Cox claimed he had "*severe depression*". The fire service then went through a reorganisation involving job cuts; during meetings on the topic, Mr Cox was aggressive and behaved inappropriately towards his colleagues.
69. The employer referred Mr Cox to OH for assessment. HR asked OH whether Mr Cox's recent concerning behaviour could be affected by his taking anti-depressants. OH's report stated that Mr Cox did not suffer with a disability, and if any further performance or conduct issues arose, they would be best dealt with through management. Whilst the OH doctor did seek to check that view against Mr Cox's medical records, it emerged that the latter had withdrawn his consent for his GP records to be disclosed.
70. Following a meeting with Mr Cox in which no medical reasons for his behaviour were advanced, the employer suspended him on the basis of his aggressive conduct. Mr Cox stated in a subsequent grievance that "*I will inform you of my current additional medical problem, when it is actually confirmed*". A few weeks later, in September 2009, Mr Cox emailed HR to say the following:

*"Since early July 2009 I have been suffering from a Bi-Polar disorder or its more common name of manic depression.*

*I have attached a file that explains this condition and have highlighted the normal symptoms and the specific symptoms that I have suffered since early July.*

*The psychiatrist I saw at Highwood Hospital on Wednesday, Dr A Bhiman, said that usually this condition affects sufferers in their early 20's [sic], but in my case it has been brought on via depression resulting from my accident at work in September 2008."*

71. In the same email, Mr Cox went into detail about symptoms of Bipolar Disorder he had noticed in himself, such as avoiding work and missing deadlines in depressive periods, and drinking, gambling and being aggressive in manic periods. The meeting with Dr Bhiman was recorded in a letter from the hospital which read:

*"Diagnosis: ? Bipolar Affective Disorder. The picture described by Mr Cox and his wife does seem to suggest that he might have experienced a ? Hypomanic Episode which seems to be gradually settling down".*

72. The employer referred Mr Cox to OH again, this time drawing to their attention that Mr Cox had informed them that he had been diagnosed with Bipolar Disorder. The questions posed in the letter of instruction were:

*“Is the employee fit to undertake their current role?”*

*Would adjusted duties or temporary redeployment apply and please suggest a possible time frame?*

*Is the performance significantly affected by ill health and how long is this likely to continue?*

*Is the ill health work related?*

*Is the employee likely to render reliable service and attendance in the future?*

*Is it likely that an employment tribunal would consider that this case falls within the scope of the Disability Discrimination Act and if so what adjustments should be considered?*

*Other – please detail below.”*

73. A further medical report from the hospital arrived, stating that Mr Cox “*has been trying to make an effort to monitor his behaviour and keep his aggression in check and denied any impulsive behaviour*”.
74. OH’s further report made reference to Mr Cox’s reported diagnosis of Bipolar Disorder and commented that “*it is not clear to me that this is in fact an active diagnosis*”, though it stated that there was little or no chance of him returning to work. It was followed by two further hospital reports with equivocal diagnoses of Bipolar Affective Disorder Type 3.
75. The Employment Tribunal, as upheld by the EAT, held that the employer did not have constructive knowledge of Mr Cox’s disability and had done all it reasonably could do to find out the necessary information in the circumstances. At no stage had there been a definitive diagnosis of Bipolar Disorder and Mr Cox himself had stood in the way of OH’s attempts to obtain his GP records and to obtain a definitive assessment by a psychiatrist. All the medical evidence from the hospital was equivocal in its conclusions and the only other available evidence was Mr Cox’s self-reported symptoms.
76. This decision was rather generous to the employer, as it avoided being fixed with constructive knowledge despite there being several medical reports which posited the potential diagnosis of Bipolar Disorder. The key to the Employment Tribunal’s approach to these cases in recent years, and in *Cox* in particular, seems to be that whilst the employer does not need to know that the employee is disabled *within the legal definition* to be fixed with constructive knowledge, it does need definitive evidence (i.e. a diagnosis) to show that the employee is suffering with a medically recognised condition.
77. A further point to draw from the decisions in *Wilcox*, *Cox* and *Donelien* is the relevance of the employee’s conduct to the issue of the employer’s constructive knowledge. In those cases, the Employment Tribunal had found the employees to be in some way obstructive of their employers’ attempts to gather more information about their medical conditions. In *Wilcox* the employee had withheld medical information and in *Cox*, the employee had refused OH access to his GP records. In *Donelien*, the Employment Tribunal pointed to

*“the Claimant’s attitude of confrontation and lack of co-operation with them and her refusal to allow the OH providers to contact her GP”.*

78. On one view, this makes sense – an employee’s obstructiveness would mean that there is less the employer can reasonably do to gain more information and, as we know from *Donelien*, the employer’s efforts need not be “*exhaustive*”. On the other hand, *Wilcox* and *Cox* in particular deal with mental disability and, whilst it was not found to be so in either of those cases, uncooperativeness could conceivably be a by-product of an employee’s disability. Therefore, a general rule whereby an employee’s obstructiveness counts against them could be prejudicial to some.
79. To insulate against the potential that a subsequent case could go the other way, an employer may think it worth offering to make reasonable adjustments at a time where it has some evidence of the employee’s disability, but not a definitive diagnosis.

### ***Constructive knowledge***

80. Overall, recent case law suggests that an employer will be fixed with constructive knowledge of an employee’s disability once it has had confirmation of their diagnosis (though it does not matter whether you know that they are ‘disabled’ in the legal sense).
81. In order for the employer to avoid being fixed with constructive knowledge, an Employment Tribunal must be satisfied that the employer has done all it was reasonable for it to do in pursuit of more information. Generally, that will mean referring the employee to OH as a minimum.
82. When OH gives the employer its report, case law tells us that employers should review the conclusions critically rather than accepting them at face value. That would, judging by *Donelien*, require not only reverting to OH for clarification, but also conducting your own fact-finding exercises, e.g. holding return-to-work interviews.
83. That said, it is evident from recent case law that an employer is unlikely to be fixed with constructive knowledge in circumstances where its efforts are blocked by an obstructive employee. The message to employers seeking to avoid having constructive knowledge is to do what they can to find out more information about an employee’s health, but not spend more time or money doing so than is reasonable. What is reasonable will depend on the facts of each case, and is essentially a matter of judgment for employers.

### ***Imputed knowledge***

84. We have seen from the above that employers may be fixed with constructive knowledge in some circumstances when they receive information from OH. What is more, where OH or another employee or agent (such as a recruiter) knows of the employee’s disability but does not pass that knowledge on to the employer, such knowledge can be imputed to the employer in some cases.

85. Generally speaking, this will only apply when the person with the requisite knowledge is in some way part of the employer's operation. As the EHRC Code states:

*“information will not be ‘imputed’ or attributed to the employer if it is gained by a person providing services to employees independently of the employer. This is the case even if the employer has arranged for those services to be provided.”<sup>19</sup>*

86. From this, it is clear that whilst information provided to OH may be imputed in some circumstances, knowledge gained by an independent medical expert would not be, regardless of who instructed them.

87. As to the circumstances in which knowledge will be imputed, the EHRC Code gives the following example:

*“An occupational health adviser is engaged by a large employer to provide them with information about their workers' health. The OH adviser becomes aware of a worker's disability that is relevant to his work, and the worker consents to this information being disclosed to the employer. However, the OH adviser does not pass that information on to HR or the worker's line manager. As the OH adviser is acting as the employer's agent, it is not a defence for the employer to claim that it did not know about the worker's disability. This is because the information gained by the adviser on the employer's behalf is attributed to the employer.”<sup>20</sup>*

88. As one may appreciate from the above example, the employee's consent is key to a finding of imputed knowledge. Though the case of *Hartman v South Essex Mental Health Community Care NHS Trust*<sup>21</sup> concerned negligence in the personal injury context, its consideration of imputed knowledge is also relevant in a discrimination context.

89. Mrs Hartman had declared on her pre-employment health questionnaire that she had suffered a nervous breakdown the previous year and was taking anti-depressants. Some years later, circumstances at work brought about a relapse and caused Mrs Hartman psychiatric harm, which she said her employer must have foreseen given that it had imputed knowledge of her last breakdown.

90. The Court of Appeal paid considerable attention to the context in which Mrs Hartman had disclosed the information about her health. The questionnaire had been given to her by OH and was clearly marked with the phrases *“the following information is for use by the occupational health service only”* and *“PERSONAL AND CONFIDENTIAL”*. Therefore, Mrs Hartman's disclosure of her health condition on the form could not be construed as her giving her consent for it to be disclosed to the NHS Trust for which she worked. Without her consent having been given, OH's knowledge of her disability could not be imputed to the Trust.

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<sup>19</sup> Paragraph 6.22

<sup>20</sup> EHRC Code, paragraph 5.18

<sup>21</sup> [2005] IRLR 293

91. The moral for employers, and HR in particular, is to avoid simply forgetting about a matter once it has been referred to OH. Instead, they should chase for updates and push for more information because, if they have the employee's consent to pass information on their disability to you and they have not, it is the employer who could still be fixed with imputed knowledge and the consequences of that.

## **Conclusion**

92. In summary, the first thing HR needs to know is the definition of disability under the EqA 2010. Whilst it is not essential in each individual case for HR to be aware that the employee meets the definition, HR should be aware of the different constituent parts which it will be appropriate to ask a medical expert to opine on.
93. The steps to take to avoid having constructive knowledge will vary depending on when it is in the employment relationship.
94. During recruitment, the most HR can do at the general application stage is to invite disclosure of any medical conditions and wait to see if any applicants do so. Once HR has decided to offer the job to an applicant, it may make the offer conditional on the receipt of a medical report, though it will not always be appropriate to do so.
95. There are more factors for HR to consider during the employment relationship. The starting point will usually be to refer the employee to Occupational Health with clear and precise instructions. If the resultant report finds that the employee is not disabled, its conclusions should be examined critically and further clarification should be asked for. Equally, if OH is not forthcoming with information, HR should chase them up to eliminate the possibility of knowledge being imputed to the employer.
96. A diligent HR department should also organise its own fact-finding investigation to learn more from the individual, for example, by meeting to discuss the employee's needs. If the employee is obstructive, there may be little more you can do, and Tribunals tend to understand that. The employer is required to conduct a reasonable, not exhaustive, enquiry so the time, cost and difficulty of certain lines of enquiry may be relevant.
97. Overall, disability comes in so many forms that it is not possible to give any sweeping statements as to how HR should behave in these situations. The best approach for HR is simply to stay alert to how employees are behaving and feeling, approach the subject of health sensitively but pragmatically, and avoid making snap judgments without sufficient evidence. The tide seems to be with employers at the moment, so a HR department who approaches the subject of disability sensibly should not face any significant difficulties.

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